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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 70-87

POLICE DEPARTMENT OF THE CITY OF CHICAGO; JAMES B. CONLISK, SUPERINTENDENT OF THE POLICE DEPARTMENT OF THE CITY OF CHICAGO, AND RICHARD J. DALEY, MAYOR OF THE CITY OF CHICAGO,

Petitioners.

vs.

EARL D. MOSLEY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE PETITIONER.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO 56

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OPINIONS BELOW.

The opinion of the Court of Appeals (A. 42-47) is reported at 432 F. 2d 1256 (1970).

The findings of fact and conclusions of law (A. 35-87) and the judgment order (A. 38) of the District Court are unreported.

JURISDICTION.

The judgment of the Court of Appeals was entered on October 29, 1970 (A. 41). On January 20, 1971, by order of Mr. Justice Marshall, the time within which to file a petition for a writ of certiorari was extended to February 26, 1971 (A. 47). The petition was filed on February 25, 1971, and was granted on October 12, 1971 (A. 48). The jurisdiction of this Court rests on 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether Section 193-1(i) of the Municipal Code of Chicago, Illinois, by prohibiting picketing and demonstrating on a public way within 150 feet of any primary or secondary school building while the school is in session, one-half hour before the school is in session and one-half hour after the school session has been concluded, violates the guarantee of freedom of speech established by the First Amendment to the Constitution of the United States.

2. Whether the same ordinance, by reason of overbreadth or vagueness, denies due process of law in violation of the Fourteenth Amendment.

3. Whether the same ordinance, by exempting from its restrictions "the peaceful picketing of any school involved in a labor dispute," violates the equal protection of the law clause of the Fourteenth Amendment.

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED.

I. CONSTITUTION OF THE UNITED STATES, AMENDMENT I:

"Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

CONSTITUTION OF THE UNITED STATES, AMENDMENT XIV:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws."

II. UNITED STATES CODE, TITLE 42:

§ 1983. Civil action for deprivation of rights.

"Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

III. MUNICIPAL CODE OF CHICAGO, ILLINOIS, SECTION 193-1(i):

"§ 193.1 A person commits disorderly conduct when he knowingly:

"• • •

"(i) Pickets or demonstrates on a public way within 150 feet of any primary or secondary school building while the school is in session and one-half hour before the school is in session and one-half hour after the school session has been concluded, provided that this subsection does not prohibit the peaceful picketing of any school involved in a labor dispute."

STATEMENT OF THE CASE.

This lawsuit was filed on October 23, 1968, under 28 U. S. C. A. § 2201 and 42 U. S. C. A. § 1983. It sought declaratory and injunctive relief against enforcement of Section 193-1(i) of the Municipal Code of Chicago. That ordinance provides:

> "§ 193-1 A person commits disorderly conduct when he knowingly:
>
> "• • •
>
> "(i) Pickets or demonstrates on a public way within 150 feet of any primary or secondary school building while the school is in session and one-half hour before the school is in session and one-half hour after the school session has been concluded, provided that this subsection does not prohibit the peaceful picketing of any school involved in a labor dispute."

This provision had been enacted on March 26, 1968, by the City Council of Chicago as part of a new comprehensive disorderly conduct ordinance in modern phraseology. It had been introduced by the Mayor, at the request of the Corporation Council. (Coun. J. March 6, 1968, p. 2297.) The Committee on Judiciary had reported it favorably by a vote of 6 to 2. (Coun. J. March 20, 1968, p. 2406.) Subsequently it passed the City Council by a vote of 37 to 3. (Coun. J. March 26, 1968, pp. 2561-2.) The amendment became effective April 5, 1968. Subsection (i), the measure before this Court, was included in response to the widespread disorders and considerable violence that had been occurring at that time in, near and around public grammar schools and high schools (as well as colleges and universities), and which are matters of common knowledge.

Respondent Mosley alleged in his civil rights complaint that this ordinance abridged his rights of freedom of speech, equal protection of the laws and due process guaranteed by the First and Fourteenth Amendments to the United States Constitution.

Since early September, 1967, and until April 4, 1968, Mosley had been picketing on a public way adjoining Jones Commercial High School in Chicago (A. 4, 18). He had been in the habit of appearing there after his working hours as a postal employee and of pacing back and forth carrying "a big picket sign" that said:

> "Jones High School practices black discrimination. Jones High School has a black quota." (A. 21.)

Mosley's objective was to force the Chicago Board of Education to make Jones Commercial High School "half black" (A. 19, 20). His committee had presented that demand to the associate superintendent of schools in charge of vocational education (A. 19, 20). At the trial Mosley asserted that, according to the Board of Education "head counts," there were, "as we sit here right now" (June 6, 1969), 1006 students at Jones Commercial High School and that, of these, 742 were white, 240 black, and 20 Puerto Rican (A. 20). He further claimed that of the black students "less than 100" would graduate. There was no showing that not more than 100 out of 240 is an unduly small percentage of graduations. And on cross-examination, Mosley admitted:

> "No, I could not say that any black student has been denied enrollment at Jones Commercial High School." (A. 28.)

It is not, however, contended that Mosley's picketing was violent or actually occasioned violence.

Upon reading in a newspaper of the enactment of the ordinance here in question, Mosley inquired, so he testi-

fied, of an unnamed representative of the Human Relations Section of the Chicago Police Department (A. 5, 22), an unnamed desk sergeant at the nearest station house (A. 5, 24) and, through one of his lawyers, of an unnamed attorney in the city law department (A. 5), as to the applicability of the ordinance to his picketing activities. He said he was informed that he would have to observe the limitations required by the ordinance and that, if he did not, he would be arrested.

Thereupon, Mosley stopped picketing and instituted this action for declaratory and injunctive relief in the United States District Court for the Northern District of Illinois on October 23, 1968 (A. 3).

At the trial in the District Court on June 6, 1969 (A. 12), at the close of plaintiff Mosley's case, the trial judge, passing over the City's contention that the plaintiff had failed to prove irreparable damage (A. 33), granted the City's motion for a directed verdict on the merits (A. 34). The District Court, in its findings of fact and conclusions of law (A. 35-37), ruled that this was a proper proceeding for a declaratory judgment and that Mosley had standing to bring it (A. 36). But as to the merits of the controversy, the District Court held:

> "Section 193-1 of the Municipal Code of the City of Chicago does not violate Amendment I of the Constitution of the United States of America since it is a reasonable regulation as to time, place and manner. Rights of free speech and assembly, while fundamental in our democratic society, do not mean that everyone with opinions or beliefs to express may address a group at any public place at any time." (A. 36).

The District Court also found that the ordinance is not unconstitutionally vague and that the exemption of labor unions is a reasonable classification and does not violate the Fourteenth Amendment. A judgment order dismissing

the action was entered by the District Court on August 19, 1969 (A. 36, 37).

Mosley filed notice of appeal on September 17, 1969 (A. 39).

In reversing this judgment, the Court of Appeals for the Seventh Circuit came to the conclusion that:

> "We think it clear that the ordinance is overbroad. It lays down a blanket prohibition against all forms of picketing or demonstrating (other than labor picketing) within 150 feet of a school no matter how peaceful, pristine or innocuous. It prohibits one man carrying a sign from walking on a public sidewalk adjoining a school, without condition or reservation." (A. 44.)

In arriving at this result, the Court of Appeals may have been influenced by a misunderstanding of the City's position. The opinion states (A. 43) that "Defendants admit that at all times plaintiff's actions were peaceful and orderly, that he never interrupted the free flow of traffic to and from the school and that they had no reason to believe his activities would lead to acts which were not peaceful, orderly and quiet." Actually, these "admissions" were the City's failure to deny Mosley's requests for admissions (A. 10, 11, 31, 32).

The City questions whether it was proper for the Court of Appeals to permit such a technicality to nullify common knowledge that, in the year 1968 and also at the present time, in the city of Chicago, as well as in many other cities in the United States, activities such as Mosley's in picketing for a racial quota in front of a public school might reasonably be expected to lead to acts that would not be peaceful, orderly and quiet.

The Court of Appeals deemed it unnecessary to examine Mosley's other constitutional contentions (A. 47)—*i.e.*, that the ordinance denies due process, because of vagueness, and

violates the equal protection clause, because it exempts labor picketing.

In petitioning this Court for certiorari, the City of Chicago noted that the Illinois Supreme Court in *City of Rockford* v. *Grayned,* 46 Ill. 2d 486 (1970), on September 29, 1970, had come to a result in direct conflict with the decision of the Seventh Circuit in the instant case. In *Grayned,* an ordinance violation prosecution, the Illinois Supreme Court upheld the validity of an ordinance of Rockford, Illinois, that is word for word the same as the Chicago ordinance in the case at bar. In consequence, there is a direct conflict between a decision of a Court of Appeals and a decision of the highest state court, in a state within the same circuit, as to the validity, under the federal constitution, of identical municipal ordinances.

Furthermore, as Mosley has noted in his brief in response to the petition of the City of Chicago for a writ of certiorari (pp. 4, 5), there is now pending and under advisement in the Illinois Appellate Court, First District in *City of Chicago* v. *Polito,* Nos. 54334-5-6, an appeal from three convictions under the same Chicago ordinance which is the subject of the instant proceeding. The *Polito* cases arose out of demonstrations against busing of school children to effectuate school desegregation.

This Court granted certiorari in the instant case on October 12, 1971, and ordered that it be consolidated with the appeal in *City of Rockford* v. *Grayned,* No. 70-5106, in which on the same day probable jurisdiction had been noted.

SUMMARY OF ARGUMENT.

I.

In 1968 the City of Chicago enacted an ordinance prohibiting picketing and demonstrating on a public way within 150 feet of any primary or secondary school while the school is in session and one-half hour before and one-half hour after school sessions. This ordinance was made law in response to widespread disorders at schools, which are matters of common knowledge.

Picketing and demonstrating are more than speech, as this Court has declared on numerous occasions. Picketing and demonstrations produce, and are intended by their participants to produce, different and more potent effects than mere speech. The picket line elicits powerful conditioned responses, both favorable and unfavorable. Demonstrations are mass psychology situations educing hypersuggestibility.

Therefore, the regulation of the time and place of picketing is permitted under the Constitution so long as the regulation is reasonably related to a legitimate state interest.

Public education is an indubitable state interest. In consequence, the States, their local government agencies and their school officials have comprehensive authority to control conduct in the schools and resolve conflicts arising in the operation of the schools. The constitutional rights of students and teachers to freedom of speech and thought must be safeguarded, however, so long as they do not interfere with the educational process.

The Chicago ordinance now before this Court is narrowly

limited to school hours and the half-hours immediately before and after school sessions. The ordinance is precisely restricted to the short distance of 150 feet from a school. From the very terms of the ordinance, it is obvious that its purpose is to prevent distractions from and disruptions of the educational process.

Therefore, the ordinance is not overbroad. A municipality has as much constitutional right to enact such an ordinance as to create zones of quiet around hospitals.

II.

The Chicago ordinance exempts labor picketing from its scope. However, the issue of whether this exemption violates the equal protection clause of the Fourteenth Amendment was not passed upon by the Court of Appeals. Therefore, the issue may not properly be before this Court.

Assuming *arguendo* that the issue is before this Court, it is abundantly clear that the exemption of labor picketing is a reasonable classification and, therefore, not invidious discrimination violative of the Fourteenth Amendment.

There are obvious differences between labor picketing and civil rights demonstrations. After more than 30 years of the regulation of labor relations by the National Labor Relations Board, violence and disorders have been for the most part eliminated from labor picketing, which nowadays is usually token, symbolic picketing. Student demonstrations, parents' demonstrations and civil rights demonstrations often result in mass picketing, sit-ins, violence. These palpable differences justify the exemption of labor picketing from the ordinance before the Court.

Another reason for the exemption is avoidance of conflict with pre-emptive federal regulation of labor disputes.

In the event the Court deems the exemption of labor picketing impermissible, we urge the Court not to invalidate the whole ordinance, but only the exemption.

ARGUMENT.

I.

THE ORDINANCE DOES NOT VIOLATE THE FIRST AMENDMENT.

The Court of Appeals has held the Chicago ordinance "overbroad." (A. 44.) Although that court did recognize that "picketing . . . contains elements other than pure speech" and may be the subject of reasonable regulation, citing *Hughes* v. *Superior Court*, 339 U. S. 460, 464 (1950), the Court of Appeals in effect agreed with Mosley that so long as picketing is nonviolent and is not carried on for an illegal purpose, the time and place of the picketing cannot be regulated.

It was and is the position of the City of Chicago that regulation of the time and place of picketing is constitutional if the regulation is reasonably related to a legitimate state interest. In this regard, the City relies particularly on *Cox* v. *Louisiana*, 379 U. S. 536 (1965), and the oft quoted language therein (at 554):

> "The constitutional guaranty of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy. The control of travel on the streets is a clear example of governmental responsibility to insure this necessary order. A restriction in that relation, designed to promote the public convenience in the interest of all, and not susceptible to abuses of discriminatory application, cannot be disregarded by the attempted exercise of some civil right which, in other circumstances, would be entitled to protection. One would not be justified in ignoring the familiar red light because this was thought to be a means of

social protest. Nor could one, contrary to traffic regulations, insist upon a street meeting in the middle of Times Square at the rush hour as a form of freedom of speech or assembly."

Public education is an indubitable state interest. The Constitution of the State of Illinois impresses upon the State the duty to provide "an efficient system of high quality public educational institutions and services." *Constitution of the State of Illinois* (1970), Art. X, Sect. 1; see also *Constitution of the State of Illinois* (1870), Art. VIII, Sect. 1; *Board of Education* v. *Redding*, 32 Ill. 2d 567, 207 N. E. 2d 427 (1965).

This Court, in the very cases in which it has acted to protect the First Amendment rights of teachers and students, has reiterated its repeated emphasis upon "the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Tinker* v. *Des Moines Independent Community School District*, 393 U. S. 503, at 507 (1969). "By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values." *Epperson* v. *Arkansas*, 393 U. S. 97, at 104 (1968). The instant ordinance is in aid of the local school authority's control of the educational process.

The public schools are thus established by the State and are under the control of the State and its municipalities and local agencies. The ordinance here in question was, by its very terms, clearly enacted to prevent distraction of public school students from the instruction which the State is under the duty to provide. In *Waugh* v. *Board of*

Trustees of the University of Mississippi, 237 U. S. 589, at 596, 597 (1915), the Court said that it is not for the federal courts to entertain conjectures in opposition to the views of the State and its agencies and annul an ordinance upon disputable considerations of its wisdom or necessity.

The opinion of the Court of Appeals here admits (A. 45):

> There can be no doubt that picketing, since its contains elements other than pure speech, may be the subject of reasonable regulation. *Hughes* v. *Superior Court*, 339 U. S. 460, at 464 (1950)."

The Court of Appeals recognized that this Court, in *Cox* v. *Louisiana*, 379 U. S. 559 (1965), upheld a statute prohibiting picketing near a courthouse with the intent to obstruct justice, for the reason that the statute "was precise and was narrowly drawn to protect a valid state interest."

In the very act of finding the instant Chicago ordinance "overbroad", the Court of Appeals also admitted (A. 45, 46) that:

> "Obviously, the City of Chicago could enact an ordinance to prevent the disruption of the educational process that would not violate plaintiff's right of free speech."

The City of Chicago, we submit, has done just that in enacting the instant ordinance, which is narrowly limited to school hours and the half-hours immediately before and after school sessions. The ordinance is precisely restricted to the short distance of 150 feet from a school. From the very terms of the ordinance it is obvious that its purpose is to prevent distractions from and disruptions of the educational process.

It is no more improper for the City to create such buffer zones around schools than it is for the City to create

the traditional zones of quiet around hospitals. In fact, the Municipal Code of Chicago employs quite similar language in creating hospital zones of quiet. Section 36-1 thereof provides:

> "There is hereby created and established a zone of quiet in all territory within the block upon which abuts the premises of any hospital owned, controlled or operated by the federal, state, county or city governments or any licensed hospital or home."

The present ordinance is appropriate to the felt needs of the situation. The ordinance does not seek to repress peaceful protests and demonstrations even immediately adjacent to public schools, if they are outside school hours. It merely constitutes an effort to keep such expressions of First Amendment freedoms in reasonable channels so that they will not disrupt the quiet processes of acquiring knowledge and vocational skills. It essays to do this by merely keeping demonstrations at least 150 feet from school premises during school hours and for a half-hour before and after school hours—the times when children are arriving at and leaving school.

150 feet is no great distance. It does not prevent the students from knowing that a demonstration is going on. If students are interested, they can at suitable times examine into the demonstration more closely and participate, if they so desire. But the distance of 150 feet does tend to assure that the primary interest of students generally—acquiring an education and preparing for adult life—will be protected from distraction and interference.

The 150 foot buffer zone also aids the police in forestalling violence, since those bent on violence will make even shorter shrift of the distance limitation. Violation of the boundary serves to alert the police against the possibility of more serious transgressions.

This Court, in *Cox* v. *Louisiana*, 379 U. S. 559, at 568 (1965), cited, with apparent approval, as examples of sufficiently precise specifications of nearness, a District of Columbia statute (52 Stat. 30 (1938), DC Code, 1961, § 22-1115), prohibiting certain acts within 500 feet of foreign embassies, legations and consulates, and a New York statute (McKinney's N. Y. Laws, Penal Law § 600), prohibiting certain activities within 200 feet of a courthouse.

Nor does the ordinance prohibit speech within 150 feet of a school during school hours, except the non-pure form of speech that is picketing and demonstrating. And it prohibits them only within narrow limits.

"A state is not required to tolerate in all places . . . even peaceful picketing by an individual." *Bakery and Pastry Drivers Local* v. *Wohl*, 315 U. S. 769, at 775 (1942). As already noted, picketing is speech, plus other elements, and in its opinion the Court of Appeals acknowledged this fact (A. 45). This Court made it very clear in *Hughes* v. *Superior Court of California*, 339 U. S. 460, at 464, 465 (1950), that:

> "[W]hile picketing is a mode of communication it is inseparably something more and different . . . [t]he very purpose of a picket line is to exert influences, and it produces consequences different from other modes of communication. The loyalties and responses evoked and enacted by picket lines are unlike those flowing from appeals by printed word."

The picket line elicits powerful conditioned responses, both favorable and unfavorable. Demonstrations are mass psychology situations educing hypersuggestibility. Bystanders at demonstrations frequently find themselves caught up in an unexpected, spontaneous, unthinking loss of their inhibitions.

The Court of Appeals relied (A. 44, 45) upon *Thornhill* v. *Alabama*, 310 U. S. 88 (1940), as authority for its view that, under the First Amendment, picketing, so long as it is peaceful and not carried on for an illegal purpose, cannot be regulated as to time and place. That reliance, we submit, is simplistic and misplaced. As is well known, *Thornhill* has long since been qualified with numerous exceptions by a long line of decisions of this Court. *Thornhill* invalidated an Alabama statute that made all labor picketing illegal. The language in *Thornhill* was appropriate to that broad purpose. But implementation of the policy of protecting picketing as a form of communication inevitably encountered the myriad thorny problems of manner and purpose, time and place. The late Mr. Justice Frankfurter has chronicled this development in *Teamsters' Union, Local 595* v. *Vogt, Inc.*, 354 U. S. 284 (1957). See also Gregory, *Labor and the Law* (2d rev. ed. 1958), ch. XI, The Rise and Decline of the Thornhill Doctrine; Tanenhaus, *Picketing—Free Speech: The Growth of the New Law of Picketing from 1940 to 1952*, 38 Cornell L. Q. 1 (1952).

The long line of cases limiting the broad language of *Thornhill* v. *Alabama*, 310 U. S. 88 (1940) includes *Milk Wagon Drivers Union* v. *Meadowmoor Dairies*, 312 U. S. 287 (1941), *Carpenter's Union* v. *Ritter's Cafe*, 315 U. S. 722 (1942), *Bakery and Pastry Drivers Local* v. *Wohl*, 315 U. S. 769 (1942), *Giboney* v. *Empire Storage Co.*, 336 U. S. 490 (1949), *Hughes* v. *Superior Court*, 339 U. S. 460 (1950), *Edwards* v. *South Carolina*, 372 U. S. 229 (1963), and *Cameron* v. *Johnson*, 390 U. S. 611 (1968).

In *Carpenter and Joiners Union* v. *Ritter's Cafe*, 315 U. S. 722 (1942), the union petitioners, like Mosley here, claimed (at 725) that the Fourteenth Amendment constituted a constitutional command that peaceful picketing

must be wholly immune from regulation. A restaurant, which was unionized and where there was no labor dispute, was peacefully picketed by the petitioners, building trades unions, because the owner of the restaurant also owned a building under construction by a contractor who employed non-union labor. Nevertheless, this Court upheld a Texas injunction, prohibiting the picketing, with the declaration that (at 727, 728):

> "[R]ecognition of peaceful picketing as an exercise of free speech does not imply that the states must be without power to confine the sphere of communication to that directly related to the dispute. . . .
>
> "To hold otherwise would be to transmute vital constitutional liberties into doctrinaire dogma. . . . We must be mindful that 'the rights of employers and employees to conduct their economic affairs and to compete with others for a share in the products of industry are subject to modification or qualification in the interests of the society in which they exist.' . . . *Thornhill* v. *Alabama*, 310 U. S. 88, 103, 104."

In like manner, Mosley here contends that peaceful civil rights picketing must be wholly immune from regulation. But here, likewise, recognition of such picketing as an exercise of free speech does not deprive the state and its local governmental units of the power to place limits on the sphere of such communication in the educational interests of the society in which Mosley exists.

Milk Wagon Drivers Union v. *Meadowmoor Dairies*, 312 U. S. 287 (1941), held that the issuance of an injunction restraining peaceful picketing did not constitute an infringement of the right of free speech where previous acts of violence by members of the union or their sympathizers gave to the picketing, even though peacefully carried on, a coercive effect. The admittedly peaceful picketing had occurred against a background of extensive violence— win-

dow-smashing, bomb explosions, stench bombs, arson, beatings (at 291, 292). But, as a dissenting opinion noted (at 314, 315), the violence, which occurred during a farmers' strike, had taken place eight months before any picketing by the milk wagon drivers' union, and it was not until four years later that the trial judge granted an injunction. "All of the violence," Justice Black observed, "took place many months before any of the picketing occurred" (at 314, 315). Yet this Court in the *Meadowmoor* case found that the Illinois Supreme Court could reasonably conclude that the peaceful picketing was coercive. Justice Frankfurter, writing for the Court, said (at 294):

> "[A]cts which in isolation are peaceful may be part of a coercive thrust when entangled with acts of violence. The picketing in this case was set against a background of violence. In such a setting it could justifiably be concluded that the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful."

This Court declared that in this situation a state is not limited to prosecuting acts of violence after they occur. On the contrary, a state may take preventive measures. In the words of Justice Frankfurter (at 295):

> "[T]he Fourteenth Amendment does not make unconstitutional the use of the injunction as a means of restricting violence. We find nothing in the Fourteenth Amendment that prevents a state if it so chooses from placing confidence in a chancellor's decree and compels it to rely exclusively on a policeman's club."

Likewise, the Fourteenth Amendment does not prevent a state or any of its local governmental units from enacting, against a background of extensive student disorders and violence, a statute or ordinance designed to prevent picketing, otherwise peaceful, in a narrowly defined area where it can reasonably be concluded that, because of the background

of disorder and violence, picketing, though peaceful, will have a coercive effect.

International Brotherhood of Teamsters, Local 695 v. *Vogt, Inc.*, 354 U. S. 284 (1957), affirmed a Wisconsin injunction against picketing the premises of an employer to induce some of its employees to join the union. The ground of the decision was that the picketing was for a purpose unlawful under state law, namely, for the purpose of coercing an employer to interfere with its employees in the exercise of their right to join or not to join a union.

The majority opinion in *Vogt* was written by Justice Frankfurter, who improved upon the occasion with a review of the history of the cases of this Court on "the limits imposed by the Fourteenth Amendment on the power of a State to enjoin picketing" (at 285). He remarked (at 287):

> "It is inherent in the concept embodied in the Due Process Clause that its scope be determined by a 'gradual process of judicial inclusion and exclusion.' *Davidson* v. *New Orleans*, 96 U. S. 97. Inevitably, therefore, the doctrine of a particular case 'is not allowed to end with its enunciation and . . . an expression in an opinion yields later to the impact of facts unforeseen.' *Jaybird Mining Co.* v. *Weir*, 271 U. S. 609, 619 (Brandeis, *J.*, dissenting). It is not too surprising that the response of States—legislative and judicial—to use of the injunction in labor controversies should have given rise to a series of adjudications in this Court relating to the limitations on state action contained in the provisions of the Due Process Clause of the Fourteenth Amendment. It is also not too surprising that examination of these adjudications should disclose an evolving, not a static, course of decision."

In the course of his summary of the leading cases in this area, Justice Frankfurter remarked (at 290):

> "Although the Court in *Ritter's Cafe* and *Wohl* did not question the holding of *Thornhill*, the strong reliance on the particular facts in each case demon-

> strated a growing awareness that these cases involved not so much questions of free speech as review of the balance struck by a State between picketing that involved more than 'publicity' and competing interests of state policy."

The dissenting opinion of Mr. Justice Douglas in *Vogt* (at 295-297) characterized the line of cases summarized in *Vogt* and *Vogt* itself as a complete retreat from *Thornhill* v. *Alabama*, 310 U. S. 88 (1940), and *A. F. of L.* v. *Swing*, 312 U. S. 321 (1941). The net result, he said (at 297), was:

> "[F]or practical purposes, the situation now is as it was when *Senn* v. *Tile Layers Union*, 301 U. S. 468, was decided. State courts and state legislatures are free to decide whether to permit or suppress any particular picket line for any reason other than a blanket policy against all picketing."

According to Justice Frankfurter's historical summary in *Vogt*, 354 U. S. 284, at 291 (1957), "[t]he decisive reconsideration" of "the broad language of the *Thornhill* case" "came in *Giboney* v. *Empire Storage and Ice Co.*, 336 U. S. 490" (1949). In *Giboney* an ice peddlers' union was picketing a wholesale distributor of ice who was selling ice to non-union ice peddlers. The objective of the picketing, which was peaceful, was to obtain better pay and working conditions for ice peddlers by inducing all wholesale ice distributors in Kansas City to agree not to sell ice to non-union peddlers. Only Empire Storage refused to agree. It obtained an injunction against the peaceful picketing, on the ground that the objective of the picketing was illegal under a Missouri criminal statute prohibiting combinations in restraint of trade. The Missouri Supreme Court affirmance of the injunction was unanimously affirmed by this Court.

In *Giboney* the union asserted that its right to picket was guaranteed by the First and Fourteenth Amendments because a labor dispute did exist and its picketing was truthful

and peaceful. This Court unanimously rejected that contention, stating (at 497), "The Constitution has not so greatly impaired the states' or nation's power to govern." It held that the states and the nation have the power to enact laws prohibiting combinations in restraint of trade and that they have the further power to exempt or not exempt, as they choose, labor unions from such laws. Missouri did not so exempt labor unions; therefore, the peaceful picketing of the union in *Giboney* was illegal. This Court expressly repudiated the proposition that peaceful picketing is beyond legislation (at 500). On the contrary, in the words of the Court in *Wohl,* 315 U. S. 769, at 775 (1942):

> "A state is not required to tolerate in all places . . . even peaceful picketing by an individual."

More recently, in *Cameron* v. *Johnson,* 390 U. S. 611 (1968), this Court upheld the validity of a Mississippi statute prohibiting picketing, singly or in concert with others, and mass demonstrations in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from any public premises, state property, county or municipal courthouses, city halls, office buildings, jails or other public buildings or property, or with the transaction of public business or the administration of justice therein or so as to obstruct or unreasonably interfere with free use of public streets, sidewalks or ways. The opinion of this Court contains the comment (at 619):

> "Any chilling effect on the picketing as a form of protest and expression that flows from good faith enforcement of this valid statute would not, of course, constitute that enforcement an impermissible invasion of protected freedoms. *Cox* v. *Louisiana,* 379 U. S. 559, at 564."

But it was in *Edwards* v. *South Carolina,* 372 U. S. 229 (1963), that this Court expressly indicated that an enactment such as the instant ordinance is constitutional. In

Edwards several hundred Negroes had demonstrated on the state house grounds in generalized protest against discrimination. A crowd of whites, presumably hostile, gathered and watched the demonstration. But police presence was ample. There was no violence. The demonstrators were arrested and convicted of breach of the peace. Affirmance by the South Carolina Supreme Court was reversed by this Court. In the course of holding that the convictions infringed the demonstrators' rights of free speech, freedom of assembly and freedom to petition for the redress of grievances, this Court stated (at 236):

> "We do not review in this case criminal convictions resulting from the evenhanded application of a precise and narrowly drawn regulatory statute evincing a legislative judgment that certain specific conduct be limited or proscribed. If, for example, *the petitioners had been convicted upon evidence that they had* violated a law regulating traffic, or had *disobeyed a law reasonably limiting the periods during which the State House grounds were open to the public, this would be a different case.*" (Emphasis supplied.)

State House grounds are as public as a street or sidewalk. If the state can limit access to State House grounds to certain specified periods, and thus limit picketing and demonstrating on State House grounds to certain periods of the day, then the state, in furtherance of its interest in public education, can equally limit access to certain streets and sidewalks to certain periods and can, more narrowly, limit in particular certain kinds of access—access for the purpose of picketing and demonstrating—to certain streets and sidewalks (those within 150 feet of a public school) at certain hours of the day (during and immediately before and after school hours).

In *United States* v. *O'Brien*, 391 U. S. 367, at 376 (1968), this Court noted that it has held that:

> "[W]hen 'speech and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."

The Court then went on to explain (at 376, 377) that, whatever the imprecision inhering in such terms as "compelling", "substantial", "paramount" and so forth, it is clear that a governmental regulation is sufficiently justified—

1) if it is within the constitutional power of the Government;

2) if it furthers a substantial governmental interest;

3) if the governmental interest is unrelated to the suppression of free expression; and

4) if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Applying this test to the Chicago ordinance now before this Court, it is clear the incidental limitations on First Amendment freedoms therein are justified by a sufficiently important governmental interest, in that:

1) it is within the state power and duty to provide a system of public education and protect it from disturbance;

2) its ban on disruptive and distracting conduct around public schools during school hours and during the half-hour periods immediately before and after school hours when the pupils are going to and coming from school furthers the state's interest in public education;

3) the governmental interest in providing public education in an appropriate atmosphere conducive to the learning process is unrelated to the suppression of free expression; and

4) the possible limited restriction on First Amendment freedoms involved is no greater than is essential to the state's interest in public education.

It is a distortion of the facts to dwell upon the fortuitous circumstance that the particular individual who filed this test action for declaratory judgment apparently conducted himself peaceably, and to ignore the background of widespread violent demonstrations, in Chicago and throughout the nation, much of it engaged in by the students themselves, in response to which this legislation was enacted.

The opinion of the Court of Appeals adverts to what it calls the City's admission that not only were Mosley's actions peaceful and orderly, but the City had no reason to believe his activities would lead to acts which were not peaceful, orderly and quiet (A. 43, 46). This admission was no more than technical and *pro forma*, the result of the City's failure to deny Mosley's requests for admissions (A. 10, 11, 31, 32). Though this may be binding as between Mosley and the City, it did not justify the Court of Appeals, in weighing the reasonableness of the ordinance, to fail to take judicial notice of the extremely unsettled state of affairs in the public schools of Chicago as well as of many other cities in all parts of the nation—a matter of common knowledge.

The Chicago ordinance was narrowly drafted to effectuate weighty and urgent public purposes. Persons sincerely interested in education should find nothing unreasonable in the modest restrictions of this precautionary measure. It should be upheld.

II.

THE EXEMPTION OF LABOR PICKETING FROM THE ORDINANCE IS NOT INVIDIOUS DISCRIMINATION AND DOES NOT VIOLATE THE FOURTEENTH AMENDMENT.

The Court of Appeals, in reversing the District Court in *Mosley*, deemed it unnecessary to examine the issue of whether the Chicago ordinance violated the equal protection clause of the Fourteenth Amendment (A. 47). Therefore it is doubtful if the issue is properly before this Court.

In his complaint filed in the District Court Mosley alleged in a general way that the "ordinance denies him equal protection of the law in violation of the First and Fourteenth Amendments" (A. 6). At the trial his attorney asserted that "the proviso regarding the labor dispute . . . constitutes a violation of the equal protection clause" (A. 14). The District Court found that "the exemption of labor unions is a reasonable classification and the City has no right to regulate labor disputes as they are governed by Federal labor laws" (A. 36, 37).

But the Court of Appeals stated in its opinion (A. 47) that having determined that the ordinance is unconstitutional on its face because of overbreadth (A. 44), "we do not deem it necessary to examine plaintiff's other constitutional contentions" (A. 47).

The reason for the inclusion of the labor exemption proviso in the ordinance was the belief of the City Council of Chicago, and its legal advisers in enacting the ordinance, that such exemption was necessitated by federal pre-emption of the regulation of labor relations under the Labor-Management Relations Act. *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U. S. 369, at 383, 390, 391 (1969). This was also the defense

of the labor picketing exemption made in the City's argument at the trial (A. 15, 16). The District Court agreed with that position and adopted it in its Findings of Fact and Conclusions of Law (A. 36, 37). As we have said, the Court of Appeals did not rule upon it.

The argument based on federal pre-emption has some merit. Despite the exemption in Section 152 of the National Relations Act (29 U. S. C. A. § 152) of states and their political subdivisions from the definition of "employer," there are many aspects of concerted activities by public employees which do fall within the exclusive federal jurisdiction. Observance of and respect for the picket lines of public employees by union employees of private employers can have repercussions in the federal sphere. Rather than become involved in this quagmire of thorny questions of law and labor relations, the City Council exempted labor picketing from the ordinance.

Apart from the question of federal pre-emption, the City Council was on solid ground in subjecting labor picketing and general protest picketing to different rules. The equal protection clause of the Fourteenth Amendment does not deprive the States of the power to make reasonable classifications in legislation enacted under their police powers.

For a state legislative classification to be violative of the equal protection clause, the classification must amount to an invidious discrimination. There is no violation of equal protection where the legislative distinction reflects the fact or the reasonable legislative belief, that evils in the same field are of different dimensions and proportions, requiring different remedies. Nor is there a violation of equal protection where the discrimination occurs as a consequence of reformative legislation which takes one step at a time and addresses itself to the phase of the problem which seems most acute to the legislative mind.

In *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U. S. 483 (1955), the Court stated the matter thus (at 489):

> "The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. *Tigner* v. *Texas*, 310 U. S. 141. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. *Semler* v. *Dental Examiners*, 294 U. S. 608. The legislature may select one phase of one field and apply a remedy there, neglecting the others, *A. F. of L.* v. *American Sash Co.*, 335 U. S. 538. The prohibition of the Equal Protection Clause goes no further than the invidious discrimination."

The Fourteenth Amendment thus permits the states a wide scope of discretion in enacting laws that affect some groups differently than others. The constitutional safeguard is transgressed only if the classification rests on grounds wholly irrelevant to the state objective. Since state legislative bodies are presumed to have acted within their constitutional power, a statutory classification determination is not invalid if any available state of facts justifies it. *McGowan* v. *Maryland*, 366 U. S. 420, at 426 (1961).

Apart from the question of federal pre-emption, the City Council of Chicago, in endeavoring to safeguard peaceful conditions for public education, was on solid ground in laying down slightly different rules for labor picketing and general protest.

Although the civil rights movement has understandably endeavored to press into its service the constitutional precedents developed in labor relations litigation, there are important differences between labor picketing and picketing by civil rights groups. See Kamin, *Residential*

Picketing and the First Amendment, 61 Nw. U. L. Rev. 177, at 208, 209 (1966).

The Chicago school picketing ordinance was enacted in 1968. It envisaged labor picketing as of that date and this is now as it was then. By 1968 labor picketing had evolved, largely as the result of the administrative activity of the National Labor Relations Board over a period of more than 30 years, into something totally different from labor tactics (and management tactics) in Debs' Pullman strike, the bloody steel strikes of the late 19th century and the bloody coal mine strikes of the early 20th century. The sit-down strikes of the 1930's are no longer a feature of labor disputes, nor is the mass picketing of the years immediately after World War II.

Labor picketing is now usually token picketing. Its purpose is to communicate the information that a labor dispute is in progress at the establishment concerned and to enlist the cooperation of other members of organized labor and their sympathizers in not working there, in not delivering supplies, etc. It seldom leads to disruption of the public peace, hardly ever to window smashing, arson. Labor picketing can be carried on without interrupting classes or even distracting the students. A labor dispute at a school may, it is true, result in a shortage of teachers, but this has nothing to do with the distance of labor pickets from the schoolhouse door. Furthermore, under Illinois law a strike by employees of a public school is illegal and enjoinable and may be dealt with accordingly. *Board of Education* v. *Redding,* 32 Ill. 2d 567, at 571, 572 (1965).

As we all know, student demonstrations at schools—and even such demonstrations by parents and "concerned citizens"—are utterly different. Mass picketing, sit-ins, smashed windows have been the order of the day. The very

purpose of such demonstrations often is to bring the educational process to a halt. In 1969 there were some 6000 such incidents—ranging from political protests through racial strife to arson attempts—in the nation's public high schools. NEWSWEEK, Feb. 16, 1970, p. 65.

These palpable differences between protest demonstrations and labor picketing justify the exemption of labor picketing from the ordinance. The Illinois Supreme Court was correct in upholding such an exemption in *City of Rockford* v. *Grayned*, 46 Ill. 2d-486 (1970).

However, in the event the Court deems the exemption of labor picketing impermissible, we urge the Court not to invalidate the whole ordinance, but only the exemption.

Unconstitutional exceptions may be stricken out of an enactment without invalidating the whole, when to do so does not defeat the general legislative intent. "Where an excepting provision in a statute is found unconstitutional, courts very generally hold that this does not work an enlargement of the scope or operation of other provisions with which that provision was enacted and which it was intended to qualify or restrain." *Davis* v. *Wallace*, 257 U. S. 478, at 484 (1922).

Here, to eliminate the labor picketing exception, but allow the broad ban on picketing and demonstrating immediately adjacent to schools during school hours to stand would not defeat the general intent of the City Council, which is to prevent disturbance of the educational process.

CONCLUSION.

The judgment of the Court of Appeals should be reversed and the Chicago ordinance declared valid.

Respectfully submitted,

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